ORDER OF THE COURT (Fifth Chamber)

1 March 2011 *

In Case C-457/09,

REFERENCE for a preliminary ruling under Article 234 EC from the tribunal de première instance de Liège (Belgium), made by decision of 29 October 2009, received at the Court on 23 November 2009, in the proceedings

Claude Chartry

v

État belge,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel, President of the Chamber, M. Ilešič and M. Berger (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: A. Calot Escobar,

* Language of the case: French.

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Article 6 EU, in its version before the Treaty of Lisbon, and of Article 234 EC.

2 The reference was made in proceedings between Mr Chartry and the Belgian State concerning taxation.

Legal context

3 Article 26 of the Special Law of 6 January 1989 on the Cour d'arbitrage (Constitutional Court) (*Moniteur Belge* of 7 January 1989), as amended by, inter alia, the Special Law of 12 July 2009 (*Moniteur Belge* of 31 July 2009), is worded as follows:

'§ 1. The Constitutional Court shall, by way of preliminary ruling, hear and determine, in the form of judgments, matters relating to:

…

3° the infringement by a statute, a decree or a rule referred to in Article 134 of the Constitution of the articles of Title II, "The Belgians and their Rights", and Articles 170, 172 and 191 of the Constitution,

…

§ 2. Where such a question is raised before a court of law, the latter shall request the Cour d'arbitrage to give a ruling on that question.

None the less, the court of law shall not be obliged to do so:

…

2° if the Constitutional Court has already ruled on a question or appeal on an identical subject.

…

§ 4. When it is alleged before a court of law that a statute, a decree or a rule referred to in Article 134 of the Constitution infringes a fundamental right guaranteed in a wholly or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, that court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Cour d'arbitrage for a preliminary ruling.

In derogation from paragraph 1, the obligation to refer a preliminary question to the Constitutional Court shall not apply:

1° in the cases referred to in paragraphs 2 and 3;

… ’

4 Article 28 of the Special Law of 6 January 1989 on the Cour d’arbitrage provides:

‘The court of law that referred the question for a preliminary ruling, and any other court of law called upon to adjudicate in the same case, shall comply with the judgment given by the Cour d’arbitrage in the settlement of the case in which the questions mentioned in Article 26 were referred.’

The dispute in the main proceedings and the question referred for a preliminary ruling

5 Mr Chartry, resident in Belgium, worked as an informant for a company established in Belgium which specialised in acting for insured persons.

6 Following an audit, the Belgian tax authority adjusted Mr Chartry’s declared earnings for the fiscal years 1994, 1995 and 1996 and recalculated the amount of direct taxes owed by Mr Chartry in respect of those years. The additional tax for the year 1994 was payable by 18 February 1997, for the year 1995 by 18 September 1997 and for the year 1996 by 25 August 1997.

7 On 11 February and 9 October 1997, Mr Chartry lodged objections against the decisions fixing those additional amounts of tax.

8 On 30 November and 7 December 2001, Mr Chartry was issued with orders for payment stopping time from running.

9 Mr Chartry's objections were, for the most part, rejected by decision of the tax authorities of 17 October 2007.

10 On 17 January 2008, Mr Chartry brought proceedings before the tribunal de première instance de Liège (Court of First Instance, Liège). He submits that, according to Belgian tax legislation, direct taxes are time-barred five years after the date fixed for their payment and that there has been no action stopping time from running for the purpose of Article 2244 of the Belgian Civil Code in the five years following the date fixed for payment of the additional tax claimed from him. Concerning the two orders for payment served on him in 2001, he invokes the case-law of the Belgian Cour de cassation, according to which an order for payment issued on account of a disputed tax debt does not have the effect of stopping time running for the purpose of Article 2244 of the Belgian Civil Code.

11 In response, the Belgian State asserts that, under Article 49 of the Programme Law of 9 July 2004 (*Moniteur Belge* of 15 July 2004), even if the tax debt is disputed, an order for payment must be interpreted as constituting an action stopping time running for the purpose of Article 2244 of the Belgian Civil Code.

12 The national court indicates that, by judgments of 7 December 2005 and 1 February 2006, the Cour d'arbitrage held that Article 49 of the Programme Law of 9 July 2004 has retroactive effect prejudicing the judicial safeguards enjoyed by citizens, but that it is justified by exceptional circumstances and dictated by overriding reasons relating to the public interest.

13 The national court holds that Article 49 of the Programme Law of 9 July 2004, having regard to its retroactive character, constitutes an intervention by the legislature in pending judicial proceedings which, in Mr Chartry's specific situation, is not justified by a fair balance between the requirements of general interest and the protection of his fundamental rights.

14 However, the national court considers that it is prevented from giving due effect to that finding by Article 26 of the Special Law of 6 January 1989 on the Cour d'arbitrage which, in principle, obliges the court before which it is invoked, when a rule infringes a fundamental right guaranteed both by a provision of the Belgian Constitution and by a provision of European or international law, first to refer the constitutionality of the rule in question to the Cour d'arbitrage for a preliminary ruling. It is true that point 1 of the second subparagraph of Article 26(4) and point 2 of the second subparagraph of Article 26(2), that obligation is not binding on that court in the present case, for the Cour d'arbitrage has twice already affirmed that Article 49 of the Programme Law of 9 July 2004 is consistent with the Belgian Constitution. However, those decisions of the Cour d'arbitrage prevent the national court from carrying out a specific review, tailored to the particular circumstances of the present case before it.

15 Those were the circumstances in which the tribunal de première instance de Liège decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Article 6 [EU] and Article 234 [EC] preclude national legislation, such as the Law of 12 July 2009 amending Article 26 of the Special Law of 6 January 1989 on the Cour

d'arbitrage, from requiring the national court to make a reference to the Constitutional Court for a preliminary ruling, if it finds that a citizen taxpayer has been deprived of the effective judicial protection guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [signed at Rome on 4 November 1950; "the ECHR"], as incorporated into Community law, by another national law, namely: Article 49 of the Programme Law of 9 July 2004, without that national court's being able to ensure immediately the direct effect of Community law in the proceedings before it or to carry out a review of compatibility with the ECHR when the Constitutional Court has recognised the compatibility of the national legislation with the fundamental rights guaranteed by Title II of the Belgian Constitution?'

Jurisdiction of the Court

16 The Belgian and French Governments and the European Commission, which have submitted written observations, submit that the Court does not have jurisdiction to answer the question referred.

17 In order to determine whether the Court has jurisdiction, it is necessary to consider the subject-matter of the question referred.

18 By its question, the national court asks, in essence, whether it is contrary to Article 234 EC for legislation of a Member State to require the courts of that Member State to refer a question beforehand on whether a provision of national law is consistent with a fundamental right guaranteed by the Constitution when, at the same time, the conflict of that provision with a fundamental right guaranteed in full or in part by Union law is at issue, on the one hand, and to bind the courts of that Member State

with regard to the findings of law made by the national court responsible for reviewing the constitutionality of laws, on the other.

19 In that regard, it must be borne in mind that, according to the settled case-law of the Court, in order to ensure the primacy of EU law, the functioning of the system of cooperation between the Court of Justice and the national courts, established by Article 234 EC, requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate (see Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 52).

20 More specifically, the Court has ruled that Article 234 EC precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question

all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling (*Melki and Abdeli*, paragraph 57).

21 However, it must also be borne in mind that, when proceedings are brought before it under Article 234 EC, the Court has jurisdiction to give preliminary rulings concerning the interpretation of the EC Treaty and the validity and interpretation of the acts of the institutions of the European Union. In that context, the jurisdiction of the Court is confined to considering provisions of EU law only (see, inter alia, orders of 16 January 2008 in Case C-361/07 *Polier*, paragraph 9, and of 12 November 2010 in Case C-339/10 *Asparuhov Estov and Others* [2010] ECR I-11465, paragraph 11).

22 As regards the requirements flowing from the protection of fundamental rights, it is settled case-law that they are binding on Member States whenever they are required to apply EU law (see *Asparuhov Estov and Others*, paragraph 13).

23 In the same way, Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter') states that its provisions are addressed 'to the Member States only when they are implementing European Union law'.

24 Furthermore, that limitation has not been amended by the entry into force of the Treaty of Lisbon on 1 December 2009, since when, under Article 6(1) EU, the Charter has had the same legal value as the Treaties. That article states that the provisions of the Charter are not to extend in any way the competences of the Union as defined in the Treaties.

25 Although the right to an effective legal remedy, guaranteed by Article 6(1) of the ECHR, referred to by the national court, constitutes a general principle of Union law (see, inter alia, Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraphs 177 and 178), and was reaffirmed by Article 47 of the Charter, the fact remains that the order for reference does not contain any specific information enabling the subject-matter of the dispute in the main proceedings to be considered to be connected with EU law. The dispute in the main proceedings, between a Belgian national and the Belgian State concerning taxation of activities carried out within the territory of that Member State, is not connected in any way with any of the situations contemplated by the provisions of the EC Treaty on the free movement of persons, of services, or of capital. Moreover, that dispute does not concern the application of national measures by which that Member State implements EU law.